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Supreme Court, U.S.
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No. 95-1498

In the Supreme Court of the United States

OCTOBER TERM, 1995

THOMAS W. HILL, PETITIONER

v.

DEPARTMENT OF THE AIR FORCE, ET AL.

ON PETITION FOR EXTRAORDINARY WRIT, AND IN THE ALTERNATIVE, PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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44 pp

QUESTIONS PRESENTED

1. Whether the district court was precluded from reexamining the determination of the Federal Circuit that petitioner's claim of age discrimination was frivolous.

2. Whether the Civil Service Reform Act of 1978 (CSRA) precluded the district court from adjudicating petitioner's claims under the Privacy Act.

3. Whether the CSRA precluded the district court's adjudication of petitioner's constitutional claims against the individual respondents.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C1-C3) is unreported. The opinions of the district court are also unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on October 20, 1995. A petition for rehearing was denied on December 14, 1995. Pet. App. D1-D2. The

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[1] The appendix to the petition does not include the relevant opinions of the district court. We have therefore included them in an appendix to this brief.

petition for a writ of certiorari was filed on March 13, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1651(a), 1254(1).

STATEMENT

1. Petitioner was a civilian employee of the Air Force. Pet. 2; Pet. App. A2. In May, 1985, the Air Force served him with a notice of proposed removal from federal service based on his alleged misuse of government long distance telephone service and his unauthorized removal of records from the desk of a prior supervisor. Merit Systems Protection Board Initial Decision (MSPB Dec.) at 2 (Nov. 6, 1985). For the same reasons, the Air Force suspended petitioner's top secret security clearance. Pet. App. A1-A2. In July, 1985, petitioner's employment was terminated. MSPB Dec. at 2.

Petitioner appealed his removal to the Merit Systems Protection Board (MSPB). The MSPB determined that petitioner had engaged in the charged misconduct and that the misconduct related to his integrity and trustworthiness. *Hill* v. *Department of the Air Force*, 844 F.2d 1407, 1413 (10th Cir.), cert. denied, 488 U.S. 825 (1988). The MSPB also determined that petitioner's claim of age discrimination was frivolous. *Hill* v. *Department of the Air Force*, 796 F.2d 1469, 1471 n.2 (Fed. Cir. 1986). It therefore affirmed the agency's decision to remove petitioner from his position. MSPB Dec. at 24.

2. The Federal Circuit has exclusive jurisdiction over appeals from MSPB decisions that do not involve cases of discrimination, while federal district courts have jurisdiction over discrimination cases. 5 U.S.C. 7703(b)(1) and (b)(2). Under Federal Circuit precedent, "mixed cases" involving both discrimination and

other claims must be heard in federal district court. *Williams* v. *Department of Army*, 715 F.2d 1485 (1983).

Petitioner appealed the MSPB decision to the Federal Circuit, but then moved to have his appeal transferred to the United States District Court for the District of New Mexico, on the ground that it was a mixed case. The Federal Circuit denied the transfer. *Hill* v. *Department of the Air Force*, 796 F.2d 1469 (Fed. Cir. 1986). It held that the appeal was not a "mixed case," because petitioner had "alleged no set of facts which, if proven, would comprise even a minimum *prima facie* case of age discrimination." *Id.* at 1471. The Federal Circuit subsequently affirmed the MSPB's decision that petitioner had engaged in misconduct that justified his dismissal. *Hill* v. *Department of the Air Force*, 818 F.2d 874 (1987) (Table).

3. After the MSPB decision, but before the Federal Circuit's transfer decision, petitioner filed suit in the United States District Court for the District of New Mexico against the Air Force and two of his former military supervisors, respondents Paul S. Britt and Paul J. Vallerie. Petitioner alleged that the agency violated the Age Discrimination in Employment Act of 1967 and the Privacy Act of 1974; he asserted claims under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against the individual respondents. All of the claims related to the government's actions in dismissing petitioner and suspending his security clearance

based on petitioner's misuse of long distance telephone service and unauthorized removal of records.[2]

The district court held that it was without jurisdiction to entertain petitioner's age discrimination claim. App., *infra*, 16a. The court noted that, in the course of determining jurisdiction, the Federal Circuit had examined whether petitioner had established a prima facie case of age discrimination, and found that he had not. *Id.* at 18a. Because the question of jurisdiction and the subsidiary question whether petitioner had stated a colorable claim of age discrimination were "actually litigated and necessarily determined by the Federal Circuit," the district court concluded that the Federal Circuit's determinations on those issues should be given "preclusive effect." *Id.* at 19a.

The court dismissed petitioner's request under the Privacy Act to amend his records on the ground that petitioner "failed to seek complete administrative relief as required by [5 U.S.C. 552a(d)(3)]." App., *infra*, 27a. After the government moved to dismiss petitioner's claim for damages under the Privacy Act on the ground that it was precluded by the Civil Service Reform Act of 1978 (CSRA), the district court dismissed that claim as well. Pet. 8; Pet. App. B1.

The court also dismissed petitioner's claim that respondent Vallerie violated petitioner's right to due process by maintaining illegal records of his performance. The court held that the CSRA provides the exclusive remedy for such conduct. App., *infra*, 2a-4a. The court declined to dismiss petitioner's claims that Britt disseminated false information that obstructed

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[2] Petitioner also asserted various other claims that are not at issue here.

his employment opportunities and engaged in illegal surveillance against him. The court concluded that the CSRA did not preclude those *Bivens* claims. *Id.* at 4a-8a.

4. The court of appeals reversed the district court's refusal to dismiss the *Bivens* claims against Britt. *Hill* v. *Department of the Air Force*, 884 F.2d 1318 (10th Cir. 1989), cert. denied, 495 U.S. 947 (1990). Relying on *Bush* v. *Lucas*, 462 U.S. 367 (1983), the court held that, because disseminating false information that interferes with job opportunities is a prohibited personnel practice under the CSRA, a *Bivens* claim for that conduct is precluded by that Act. 884 F.2d at 1320. The court concluded that petitioner's claim that Britt engaged in eavesdropping on petitioner's personal phone calls was also precluded by the CSRA, even though such conduct is not a prohibited personnel practice. The court reasoned that, under *Bush*, the CSRA precludes claims that implicate the employment relationship and that petitioner's firing was due in part to his personal phone calls. *Ibid.*

5. In a subsequent opinion, the court of appeals affirmed the district court's dismissal of petitioner's remaining claims. Pet. App. C1-C3. The court affirmed the district court's holding that it lacked jurisdiction of petitioner's claim of age discrimination "for substantially the reasons stated by the district court." *Id.* at C2. The court of appeals affirmed the district court's dismissal of petitioner's claim under the Privacy Act, because it involved a challenge to a personnel action, and the CSRA "provides an exclusive remedial scheme" for such claims. *Id.* at C3. Finally, the court of appeals affirmed the district court's dismissal of petitioner's constitutional claim

against Vallerie "for substantially the reasons set forth by the district court, as well as for the reasons set forth in *Hill*, 884 F.2d 1318." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 9-12) that the courts below erred in dismissing his claim of age discrimination. That contention is without merit.

In the course of deciding whether it had jurisdiction over petitioner's appeal from the MSPB decision, the Federal Circuit was required to decide whether petitioner had asserted a colorable claim of age discrimination. *Hill*, 796 F.2d at 1470. If petitioner had asserted a colorable age discrimination claim, the Federal Circuit would not have had jurisdiction over his appeal, since only district courts can entertain appeals involving both discrimination and other claims. *Ibid.* The Federal Circuit concluded that petitioner had not raised a nonfrivolous claim of discrimination, because he had "alleged no set of facts which, if proven, would comprise even a minimum *prima facie* case of age discrimination." *Id.* at 1471. It therefore concluded that it had exclusive jurisdiction over petitioner's appeal. *Ibid.*

The court below correctly held that petitioner could not relitigate in the district court the questions of jurisdiction and age discrimination decided by the Federal Circuit. Petitioner had a full and fair opportunity to litigate those issues in the Federal Circuit, and the Federal Circuit finally resolved those issues against petitioner. Under well-established principles, petitioner therefore was not free to relitigate those issues in the district court. *Durfee* v. *Duke*, 375 U.S. 106, 111-113 (1963) (a party may not relitigate an issue

that has been "fully and fairly litigated and finally decided" by another court).

Petitioner contends (Pet. 9-10) that the decision below gave preclusive effect to the MSPB's determination of no discrimination, and that it therefore conflicts with this Court's holdings in *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104 (1991), and *Chandler* v. *Roudebush*, 425 U.S. 840 (1976), that administrative determinations are not binding in subsequent judicial proceedings under the Age Discrimination in Employment Act and Title VII of the Civil Rights Act of 1964. The court below, however, did not give preclusive effect to the MSPB's determination of no discrimination. It gave preclusive effect to the Federal Circuit's de novo determination that petitioner had failed to allege a colorable claim of discrimination. See *Hill*, 796 F.2d at 1471 ("After careful review of the record, we conclude that [petitioner] alleged no set of facts which, if proven, would comprise even a minimum *prima facie* case of age discrimination."); App., *infra*, 18a (Federal Circuit "in essence provided [petitioner] a *de novo* review of whether his allegations supported a *prima facie* showing"). There is therefore no conflict between the decision below and *Astoria* and *Chandler*.

Petitioner's contention (Pet. 11) that the decision below conflicts with *Kean* v. *Stone*, 926 F.2d 276 (3d Cir. 1991), is also incorrect. In *Kean*, the employee prevailed before the MSPB on his claim of discrimination in violation of Title VII, but appealed from what he considered to be an inadequate award of attorneys' fees. The sole question was whether the Federal Circuit or the district court had jurisdiction over that appeal. Viewing the employee's claim for attorneys' fees to be "part and parcel of the claim on

the merits," the Third Circuit held that the district court had jurisdiction. *Id.* at 287. *Kean* did not involve the question presented in this case—whether to give preclusive effect to a Federal Circuit determination that it has jurisdiction over an MSPB appeal because an employee has failed to assert a colorable claim of discrimination. *Kean* is therefore inapposite here.[3]

2. Petitioner contends (Pet. 12-14) that the courts below erred in dismissing his claim under the Privacy Act. That contention does not warrant review. The court of appeals determined that petitioner was attempting to use the Privacy Act to challenge a personnel practice prohibited by the CSRA. Pet. App. C2. The court of appeals concluded that the CSRA provides the exclusive remedy for such a claim.

This Court has observed that "[t]he CSRA established a comprehensive system for reviewing personnel action taken against federal employees." *United States* v. *Fausto*, 484 U.S. 439, 455 (1988). The CSRA reflects Congress's judgment that, as a matter of "federal personnel policy," some remedies should be

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[3] Petitioner's contention in his supplemental filing that the decision below conflicts with *O'Connor* v. *Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307 (1996), is also incorrect. In *O'Connor*, the Court held that a prima facie case of age discrimination can be established when an employee is replaced by a person in the protected class who is substantially younger. *Id.* at 1310. Nothing in that decision suggests that the court below should not have given preclusive effect to the Federal Circuit's determination that petitioner failed to assert a colorable claim of age discrimination. Indeed, as noted in Judge Newman's statement of additional views, petitioner failed to assert before the MSPB or the Federal Circuit that he was replaced by a younger person. *Hill*, 796 F.2d at 1473-1474.

available to some classes of employees for some violations of law, but that other remedies should be precluded. *Bush* v. *Lucas*, 462 U.S. at 380-381. The court of appeals' holding that an employee may not assert a Privacy Act claim to challenge a personnel practice prohibited by the CSRA is consistent with those observations.

The decision below is also consistent with the Ninth Circuit's decision in *Houlihan* v. *OPM*, 909 F.2d 383 (1990). There, the court held that an employee may not assert a claim under the Privacy Act that would require the court to determine the merits of a personnel decision. *Id.* at 384-385. The court reasoned that permitting such a claim "'would open the back door to judicial review to perhaps an overwhelming number' of CSRA claims," and would be "squarely at odds with the CSRA's statutory scheme." *Id.* at 385.

In *Kleiman* v. *Department of Energy*, 956 F.2d 335 (1992), the D.C. Circuit reached the same conclusion. There, the court held that employees may not assert claims under the Privacy Act that amount to "a collateral attack" on a personnel decision, bypassing the "exhaustive remedial scheme" established by Congress under the CSRA. *Id.* at 338.

Petitioner asserts (Pet. 12-13) that the decision below conflicts with *Strang* v. *United States Arms Control & Disarmament Agency*, 864 F.2d 859 (D.C. Cir. 1989). In *Strang*, an employee sought relief under the Privacy Act to expunge agency records stating that she failed to obtain the necessary clearances before giving Japanese officials a document containing sensitive national security information. The D.C. Circuit held that the district court had erred in granting summary judgment on that claim. *Id.* at 865-

867. That decision did not address the relationship between the Privacy Act and the CSRA. As noted above, the D.C. Circuit has since made clear that an employee may not rely on the Privacy Act to challenge a personnel practice prohibited by the CSRA. *Kleiman*, 956 F.2d at 338.

3. Finally, petitioner contends (Pet. 14-15) that the courts below erred in dismissing his *Bivens* claims against Britt and Vallerie. In *Bush* v. *Lucas*, *supra*, however, the Court held that, because the CSRA provides a comprehensive remedy for impermissible personnel actions, a federal employee may not assert a *Bivens* claim against a supervisor for constitutional violations arising out of the employment relationship. 462 U.S. at 388-390. That holding is controlling here.

The Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), 28 U.S.C. 2679, and the Whistleblower Protection Act of 1989, 5 U.S.C. 1221(e)(1), 2302(b)(8), relied upon by petitioner, do not have any bearing on petitioner's constitutional claims against Britt and Vallerie. The Westfall Act makes the government exclusively liable for the common law torts its employees commit in the course of employment. 28 U.S.C. 2679. The Whistleblower Act provides that an employee may seek corrective action from the MSPB for personnel actions against the employee resulting from disclosure of governmental misconduct. 5 U.S.C. 1221(e)(1), 2302(b)(8). Neither Act provides a remedy against a supervisor in his individual capacity for constitutional violations arising out of the employment relationship.

CONCLUSION

The petition for extraordinary relief and in the alternative for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

Civil No. 85-1485-JB

THOMAS W. HILL, PLAINTIFF

v.

DEPARTMENT OF AIR FORCE,
PAUL S. BRITT, AND
PAUL J. VALLERIE, DEFENDANTS

[Filed Sept. 21, 1987]

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Defendants' motions to dismiss, or, in the alternative, for summary judgment on Counts I and V of Plaintiff's Second Amended Complaint. The Court, having reviewed the pleadings, the evidence of record and the relevant law, and treating these as motions for summary judgment, finds that Defendants' motions should be granted in part and denied in part. To the extent that Plaintiff seeks to state a claim under the Federal Tort Claims Act, that claim will be dismissed. Plaintiff's motion to amend his Complaint to add David Hickman as Defendant will also be denied.

Defendants Paul J. Vallerie and Paul S. Britt seek dismissal or summary judgment of the claims alleged against them in Counts I and V respectively of Plaintiff's Second Amended Complaint. Both of these Defendants are Air Force employees who served as directors of Aerospace Studies and were Plaintiff's second level supervisors during the time he was employed at Kirtland Air Force Base in Albuquerque, New Mexico.

Claims against Defendant Vallerie

Plaintiff seeks damages against Defendant Vallerie in his individual capacity for violations of Plaintiff's due process rights based on Defendant Vallerie's "actions in maintaining . . . illegal records on Plaintiff's performance and conduct and his use of them to deny Plaintiff deserved employment benefits and promotion opportunities . . . ." Second Amended Complaint, First Cause of Action, ¶ 1. These records, maintained without Plaintiff's knowledge, are described as "copies of letters sent to Plaintiff's first level supervisor, directing him to take punitive actions against the Plaintiff, and also included copies of letters sent to other agency officials. *Id.*, Facts Relevant To Causes of Action, ¶ 2. They were disclosed to Defendant Britt, Vallerie's successor in office.[1]

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[1] These same records were later the subject of a request of access by Plaintiff under the Freedom of Information and Privacy Acts. The request was denied at the agency level, because they were characterized as Vallerie's "personal notes." This finding was affirmed by the United States District Court for the District of Columbia (Civ. No. 84-1952, June 26, 1985), and then by the United States Court of Appeals for the D.C. Circuit (No. 85-5805).

In many situations, damage suits will lie against federal officials for violation of one's constitutional rights pursuant to the teachings of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). A judicially created damage remedy for violation of constitutional rights by federal officials is not universally available, however. In *Bush v. Lucas*, 462 U.S. 367 (1983), the Court held that petitioner, who claimed he had been demoted from his civil service position in retaliation for his having exercised his first amendment rights, had no *Bivens*-type cause of action for damages. As petitioner's claims arose out of an employment relationship with the United States governed by "comprehensive procedural and substantive provisions giving meaningful remedies," the Court found the statutory scheme to be "a special factor counselling hesitation" and declined to fashion a separate nonstatutory damages remedy. *See id.* at 378. The statutory remedies need not be fully comprehensive or even as effective as an individual damages remedy. The Court's decision that no independent cause of action would lie was dependent on the comprehensive nature of the remedial scheme created by Congress. In deferring to the congressional scheme in such an instance, the Court limited its holding to claims of unconstitutional conduct involving personnel actions covered by this system. *Id.* at 385 n. 28; *see also* the concurring opinion of Marshall, J., *id.* at 390-91.

As to Plaintiff's due process claims against Defendant Vallerie, the evidence shows that administrative grievance procedures were in effect for resolving disputes over records maintenance not otherwise under the jurisdiction of the Privacy Act, 5 U.S.C. § 552a and that Plaintiff periodically availed

himself of those procedures. *See* Declaration of Pat H. Chrisman, ¶ 3. The Court thus concludes that Plaintiff's due process claims based upon Vallerie's maintenance and use of these "illegal" records are adequately redressable by a comprehensive statutory scheme that would preclude a *Bivens*-type damage remedy. *See also Philippus v. Griffin*, 759 F.2d 806 (10th Cir. 1985); *Vest v. United States Department of the Interior*, 729 F.2d 1284 (10th Cir. 1984); *Dynes v. Army Air Force Exchange Service*, 720 F.2d 1495 (11th Cir. 1983). Therefore, Plaintiff's second cause of action against Defendant Vallerie in his individual capacity will be dismissed.

Claims against Defendant Britt

As stated in Plaintiff's fifth cause of action, Defendant Britt, "in taking the actions which have resulted in the suspension of Plaintiff's security clearance" "willfully disseminated allegations which he knows to be false and injurious to Plaintiff's reputation, and have been designed to obstruct Plaintiff's employment opportunities." Plaintiff specifically alleges that Britt took action to remove Plaintiff's name from the list of eligibles for a position at the USAF Space Division. Defendant Britt "also personally acted to cause illegal takings of Plaintiff's personal conversations and has wantonly disseminated information to which Plaintiff has rights to privacy." Second Amended Complaint, Fifth Cause of Action, ¶¶ 1, 5. Such actions are said to have resulted in denial of due process to Plaintiff for which Plaintiff seeks damages against Defendant Britt in his individual capacity.

Plaintiff acknowledges in his Complaint that the employment obstruction actions alleged "directly

violate the provisions of 5 U.S.C. § 2302(b)(4)." Complaint, Fifth Cause of Action, ¶ 3. This section describes prohibited personnel practices applicable to "any [federal] employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—(4) deceive or willfully obstruct any person with respect to such person's right to compete for employment." As a "prohibited personnel practice," a person having such a grievance may direct it to the Office of Special Counsel ["OSC"], pursuant to 5 U.S.C. § 1026. The OSC has the authority to investigate the allegations and may, in his discretion, petition the Merit Systems Protection Board ["MSPB"] for "corrective action" against agencies or employees engaged in the prohibited practice. A decision to settle or not to pursue his claims with the OSC who declined to bring Plaintiff's claims to the attention of the MSPB.

Defendant argues that under the teachings of *Bush v. Lucas*, *supra*, Plaintiff is limited to his statutorily created remedies and that the existence of such a scheme is a special factor counseling hesitation in recognizing a separate constitutional cause of action. This Court disagrees.

Assuming for the moment that Plaintiff's allegations that Defendant Britt disseminated false information resulting in injury to Plaintiff's reputation and obstructed his employment opportunities can be substantiated, such allegations would implicate a liberty interest deserving of due process protections. *See Board of Regents v. Roth*, 408 U.S. 564, 573 (1972);

Kelleher v. Flawn, 761 F.2d 1079 (5th Cir. 1985); *Munson v. Friske*, 754 F.2d 683, 693 (7th Cir. 1985).[2]

The courts have reached differing conclusions on the issue of whether the Plaintiff's recourse to the OSC provides an adequate remedy under *Bush v. Lucas*. However, in an exhaustive consideration of the issue, the United States Court of Appeals for the District of Columbia Circuit ruled that where the alternative remedy is not judicially reviewable, it is not adequate under *Bush* and would not preclude a constitutionally based cause of action. *See Spagnola v. Mathis*, 809 F.2d 16 (D.C. Cir. 1986); *see also Kotaski v. Cooper*, 799 F.2d 1342, 1348-49 (9th Cir. 1986); *Egger v. Phillips*, 710 F.2d 292, 298 (7th Cir.), *cert. denied*, 464 U.S. 918 (1983); *Pope v. Bond*, 613 F. Supp. 708, 715 (D.D.C. 1985); *Nietert v. Kelley*, 582 F. Supp. 1536, 1537 (D. Colo. 1984). *But see Pinar v. Dole*, 741 F.2d 899 (4th Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985); *Hallock v. Moses*, 731 F.2d 754, 757 (11th Cir. 1984); *Watson v. United States Department of Housing & Urban Development*, 576 F. Supp. 580, 586 (N.D. Ill. 1983); *Cazales v. United States Department of Justice*, 569 F. Supp. 213, 229 (E.D. La. 1983), *aff'd*, 731 F.2d 280 (5th Cir. 1984), *cert. denied*, 469 U.S. 1207 (1985).

While the Supreme Court in *Bush* gave little guidance regarding precisely what is required to make a remedy adequate, it is noteworthy that the Plaintiff in *Bush* had a right to judicial review of his claims. This Court sides with the *Spagnola* court in questioning whether judicial review can be totally pre-

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[2] Whether or not the procedures supplied to Plaintiff in this case satisfied the requirements of due process is not now before the Court.

cluded when constitutional rights are at stake. 809 F.2d at 28. *See also Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions."). Thus, this Court declines to dismiss Plaintiff's due process claim against Defendant Britt in his individual capacity involving obstruction of Plaintiff's employment opportunities.

As to the other matter alleged by Plaintiff against Defendant Britt, in which he claims Britt's use of illegal surveillance against him, Plaintiff properly suggests that Britt's actions were something other than "personnel actions" within the purview of any statutory scheme. In his brief, he accuses Defendant Britt of "Gestapo-type tactics involving illegal surveillance and unwarranted takings." Combined Response to Defendants' Motions to Dismiss, or to Grant Summary Judgment Regarding Counts I and V, p. 6. The evidence presented by Plaintiff suggests that Col. Britt was involved in monitoring of Plaintiff's telephone conversations at his place of employment and in recruiting others to do the same.

To the extent that such actions interfere with Plaintiff's legitimate expectation of privacy, Plaintiff had pled an independent constitutional violation that would not be redressable under the civil sentence statutory scheme and therefore not barred by the *Bush v. Lucas* rationale. "[C]ertain actions by supervisors against federal employees, such as wiretapping, warrantless searches, or uncompensated takings, would not be defined as 'personnel actions' within the statutory scheme." *See Bush*, 462 U.S. at 385 n. 28; *see also id.* at 391 (Marshall, J., concurring).

Such an injury is not redressable by the statutory scheme as it is not a "personnel action" under 5 U.S.C. § 7502 or 5 U.S.C. § 2302. The only forum available for redress of such an inquiry would be the district court. While the Defendant points out that testimony regarding these matters was adduced at the proceedings of the Merit Systems Protection Board, no determination was made as to whether the alleged surveillance activities were contrary to law. Since these were not strictly "personnel actions," the administrative scheme did not provide a direct remedy. Even if the removal action was upheld on legitimate grounds, Plaintiff may still seek redress for this type of independent constitutional violation.

The Court thus finds that genuine issues of material fact exist as to whether Defendant Britt's actions infringed on Plaintiff's legitimate expectation of privacy. *See Katz v. United States*, 389 U.S. 347 (1967). There remain questions of fact on these issues that preclude summary judgment on this aspect of Plaintiff's claims against Defendant Britt.

Common Law claims

To the extent that Plaintiff's Complaint attempts to state a common law cause of action against these Defendants, such as one for defamation, the Court would agree with the Defendants that such an action would be barred by the *Barr v. Matteo* doctrine. In *Barr*, 360 U.S. 564 (1959), the Supreme Court held that federal officials are entitled to absolute immunity for common law torts where the defendants' actions constituted an appropriate exercise of discretion "within the outer perimeter of their duties." *Id.* at 575. This standard has been liberally applied so as to allow federal officials the freedom to perform their

duties unfettered by the threat of lawsuits which might diminish the effectiveness of governmental administration. *Id.* at 571.

Based on the evidence submitted, the Court finds that in reporting, investigating and proposing actions concerning Plaintiff's access to classified information and his removal from federal service, both Defendants were acting within the scope of their responsibility as Plaintiff's supervisors. *See Williams v. Collins*, 728 F.2d 721, 727 (5th Cir. 1984). As such, Defendants' actions were highly discretionary acts that would further the policies underlying the official immunity doctrine. *See Strothman v. Gefreh*, 739 F.2d 515, 518 (10th Cir. 1984). Even an allegation of malice will not defeat immunity where the action itself was within the scope of Defendants' employment. *Barr*, 360 U.S. at 575.

Federal Tort Claims Act claims

Next, the Court considers whether Plaintiff has stated a claim against Defendants Vallerie and Britt under the Federal Tort Claims Act ["FTCA"], 28 U.S.C. § 1346. Plaintiff filed with this Court a "Notice of Intent Regarding Federal Tort Claims Cause" asking the Court to construe his Second Amended Complaint as encompassing such a claim. Defendants move to dismiss any such claim on several grounds. First, Plaintiff has failed to name the United States as a defendant. The United States is the only proper defendant under such a claim. 28 U.S.C. § 2674. Nor is the correspondence submitted by the Plaintiff adequate to fulfill the requirement that Plaintiff file an administrative claim to the federal agency, clearly stating the total damages claimed. *See* 28 U.S.C. § 2675. This requirement is

jurisdictional and may not be waived. *Three-M Enterprises, Inc. v. United States*, 548 F.2d 293 (10th Cir. 1977). Furthermore, the only common law tort to which Plaintiff makes reference in his "Objection to Defendants' Motion to Dismiss Any Claim Under the FTCA" is slander, for which the FTCA does not waive immunity. 28 U.S.C. § 2630(h). Furthermore, Plaintiff's due process claims may not be the subject of an FTCA action. For all these reasons, the Court declines to find that Plaintiff has stated any claim under the FTCA and will grant Defendants' motion to dismiss.

Motion to Amend Complaint

Plaintiff has recently moved to amend his Second Amended Complaint to add David Hickman as a defendant. The Court finds this motion to be untimely, as the case is now preparing for trial. Accordingly, the motion to amend will be denied.

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that Defendants' motions to dismiss, or, in the alternative, for summary judgment on Counts I and V and of Plaintiff's Second Amended Complaint, be, and the same hereby are:

1. granted as to Defendant Vallerie in his individual capacity; and

2. denied as to Defendant Britt on the constitutional claims, but granted as to the common law and Federal Tort Claims Act claims.

IT IS FURTHER ORDERED that Plaintiff's motion to amend complaint to add David Hickman as a defendant be, and the same hereby is, denied.

DATED this 18th day of September, 1987.

/s/ JUAN G. BURCIAGA
JUAN G. BURCIAGA
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

Civil No. 85-1485-JB

THOMAS W. HILL, PLAINTIFF

v.

DEPARTMENT OF AIR FORCE, MERIT SYSTEMS PROTECTION BOARD, PAUL S. BRITT, AND PAUL J. VALLERIE, DEFENDANTS

[Filed Sept. 4, 1987]

MEMORANDUM OPINION

THIS MATTER comes before the Court on Defendants' motion to dismiss Plaintiff's sixth cause of action. The Court, having reviewed the pleadings, the evidence of record and the relevant law, finds that the motion is well taken and will be granted. Also, the Court finds that the motion of Defendant Merit Systems Protection Board ["MSPB" or "the Board"] to be dismissed from the action is well taken and should be granted. Lastly, the Court finds that no other claim sounding in age discrimination is fairly before the Court, so Defendants' motion to dismiss any claim by Plaintiff which alleges discrimination in relation to the removal of Plaintiff's name from a list

of eligible candidates for a job with Space Division will be granted.

Plaintiff, appearing *pro se*, filed a Complaint in this Court, stemming from his removal from federal service and his suspension of access to classified materials. The procedural background of this case is truly a tangled web but will be summarized to the extent that it bears relation to Plaintiff's sixth cause of action. In that claim, Plaintiff seeks review of a decision by the MSPB affirming his removal from federal employment and seeks *de novo* review of his allegations that his removal was based in part on discrimination on the basis of age.

After having pursued relief from the agency decisions within the agency itself, Plaintiff invoked the Board's jurisdiction to review his removal from employment, as well as his suspension of access to classified materials. In his appeal petition to the Board, he made reference to possible age discrimination without providing any details.[1] The Board is empowered to hear removal actions involving issues of age discrimination, pursuant to 5 U.S.C. § 7702(a)(1)(B)(iv), although a plaintiff need not pursue an administrative resolution and may directly file suit in district court as provided by 29 U.S.C. § 622(a). *See Doyal v. Marsh*, 777 F.2d 1526, 1535 (11th Cir. 1985). Consistent with regulation 5 C.F.R. § 1201.153(a)(1), the burden is on the appellant to state in his petition "that there was discrimination in conjunction with the matter appealed and provide specific examples of how the appellant was discrimi-

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[1] He also made allegations of discrimination on the basis of marital status, and an unspecified handicap, but these issues are not currently before the Court.

nated against." The Board gave plaintiff an opportunity to submit supporting evidence for his claims but ultimately concluded that appellant had failed to raise nonfrivolous allegations of discrimination. The Board also upheld Plaintiff's removal from federal service.

The Civil Service Reform Act of 1978 generally provides that final decisions of the MSPPB are reviewable in the Court of Appeals for the Federal Circuit. 5 U.S.C. § 7703(b)(1). In such cases, the court may set aside an agency action only if arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, procedurally infirm, or unsupported by substantial evidence. *Id.* § 7703(c). The Act, however, creates an exception for "[c]ases of discrimination." *Id.* § 7703(b)(2). Such cases include those in which the employee "alleges that a basis for the action was discrimination prohibited by, *inter alia*, the Age Discrimination in Employment Act, 29 U.S.C. § 622(a)(c). These cases are reviewable *de novo* by the district court. *Id.* § 7703(c). *See Chandler v. Poudebush*, 425 U.S. 840 (1976).

The language of § 7703 has been interpreted as disallowing bifurcation of an appeal, even where a discrimination issue is alleged as a possible basis for removal. The accepted practice is to appeal a "mixed case," that is, one involving issues of removal plus discrimination, to a district court which then has jurisdiction over all the issues decided by the MSPB. *See Christo v. Merit Systems Protection Board*, 667 F.2d 882 (10th Cir. 1981). Where there are no discrimination issues, or the discriminatory issues have "dropped out" or been abandoned, jurisdiction over the appeal is exclusive with the United States Court of Appeals for the Federal Circuit. *Meehan v. United States Postal Service*, 718 F.2d 1069 (Fed. Cir. 1983);

Williams v. Department of the Army, 715 F.2d 1485 (Fed. Cir. 1983).

In Plaintiff's case, the Board issued its final decision on December 11, 1985, upholding the Plaintiff's removal from service. Plaintiff was instructed that he could appeal the Board's decision within 30 days to the United States of Appeals for the Federal Circuit "if the Court has jurisdiction," per 5 U.S.C. § 7703(b)(1). Plaintiff did take his appeal to the Federal Circuit. Subsequently, however, Plaintiff moved that Court to transfer his appeal to the United States District Court in New Mexico on the ground that because his was a case involving age discrimination, jurisdiction over the entire appeal was exclusive with the district court.

In *Hill v. Department of the Air Force*, 796 F.2d 1469 (Fed. Cir. 1986), the Federal Circuit denied Plaintiff's motion to transfer, holding that it was not a "mixed case" that would entitle Plaintiff to seek review in the district court. The court, fearing possible circumvention of its jurisdiction "by the mere mention of discrimination in a petition for review," held that where the appellant had not raised a nonfrivolous allegation of discrimination, it was not a "mixed case" and therefore jurisdiction was proper in the Court of Appeals, pursuant to 5 U.S.C. § 7703(b)(1). *Id.* at 1471. In a later unpublished decision, the Federal Circuit affirmed the MSPB decision in its entirety.

The question now before the Court is whether this Court has jurisdiction over any of Plaintiff's fourth and sixth causes of action. As to the issues regarding Plaintiff's security clearance contained in the fourth cause of action, these matters were not addressed by the Board or the Federal Circuit, and this Court

asserts its jurisdiction over them as explained in its entry of a preliminary injunction on September 18, 1986, restoring his security clearance, and in its Memorandum Opinion and Order of August 21, 1987, clarifying the basis for the Court's jurisdiction following remand by the Tenth Circuit. The Court, however, will stay a ruling on the merits of the security clearance issues pending decision on the matter which is currently before the Tenth Circuit on appeal of the preliminary injunction.

Regarding review of the MSPB decision and the age discrimination issue, however, the Court finds it is without jurisdiction to entertain these claims. Underlying this determination is the question of how much deference this Court should accord the decision of the Federal Circuit regarding its own jurisdiction. The Government argues that the Federal Circuit's decisions, both on the merits of the appeal and the court's jurisdiction, should be given precedential, if not *res judicata*, effect by this Court.

Had the appeal been lodged originally in this Court, it is not inconceivable that this Court would have considered it a "mixed case" and proceeded with review accordingly, including *de novo* review of Plaintiff's allegations of age discrimination. However, the Court is faced with the *fait accompli* that the Federal Circuit has already reviewed and affirmed the matter on the merits and has articulated a standard for determining whether jurisdiction has been established as a threshold matter.

It is axiomatic that courts have jurisdiction to determine their own jurisdiction. Thus, the question posed to this Court is whether the Court need give full effect to the Federal Circuit's determination of a question of law regarding its own jurisdiction or

whether it is subject to collateral attack or relitigation in this Court. The legal and policy concerns involved in this issue are addressed at length in 18 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4428 (1981) and in Restatement (Second) of Judgments § 12 (1981). Consistent with the Supreme Court's rulings in *Durfee v. Duke*, 375 U.S. 106 (1963), and *Stoll v. Gottlieb*, 305 U.S. 165 (1938), much deference is afforded to the decision of the first court, when the question of jurisdiction has "been fully and fairly litigated and finally decided in the court which rendered the original judgment." *Id.* at 111. The modern view, as reflected in Restatement (Second) of Judgments § 12 is to recognize certain limited exceptions to the general principle of full faith and credit of another court whose jurisdiction is questioned.

> When a court has rendered a judgment in a contested action, the judgment precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation except if:
>
> (1) The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; or
>
> (2) Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government; or
>
> (3) The judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness

> the party seeking to avoid the judgment should have opportunity belatedly to attack the court's subject matter jurisdiction.

In applying these factors to the case at bar, this Court believes that the parties clearly had a full opportunity to litigate the jurisdiction issue in the Federal Circuit. Furthermore, the issue was finally appealable to the Supreme Court. This Court believes that the question of whether Plaintiff's appeal was "mixed case" was a close one and was not "plainly beyond" the Federal Circuit's jurisdiction. This Court acknowledges that manipulation of jurisdiction by making unsupported allegations is of legitimate concern, though one result of the Federal Circuit's decision is to limit the district court's own jurisdiction to hear discrimination issues *de novo*. However, the Federal Circuit has tried to strike a balance by requiring Plaintiff to make a minimum showing supporting his claim of discrimination. Requiring Plaintiff to make a threshold showing is not fundamentally unfair and is consistent with MSPB regulations. In reviewing the basis for its jurisdiction, the Federal Circuit is essence provided Plaintiff a *de novo* review of whether his allegations supported a *prima facie* showing and found they did not.

The Court is not totally comfortable with the Federal Circuit's decision to assume exclusive jurisdiction over the appeal. However, the Court finds that the discretionary and equitable factors weigh in favor of deferring to the Federal Circuit's findings regarding its jurisdiction over the matter of Plaintiff's appeal from the decision of the MSPB. The

result of such deference is the dismissal of Plaintiff's age discrimination claim in this forum.

Even were this Court to review Plaintiff's age discrimination claim *de novo*, Plaintiff has again stated in his Complaint totally conclusory allegations regarding this claim. Futhermore, it appears that Plaintiff failed to exhaust the administrative prerequisites in a timely manner, as required by 29 U.S.C. § 622g. As the matter was actually litigated and necessarily determined by the Federal Circuit, this Court finds that it is not inequitable to give preclusive effect to the finding that jurisdiction over Plaintiff's appeal lies with the Federal Circuit and that Plaintiff failed to state a colorable claim of age discrimination sufficient to have his action heard by the district court.

On this basis, therefore, the Court determines that it has no jurisdiction to review the MSPB decision or to take jurisdiction over Plaintiff's age discrimination claim. As there are no remaining claims against the MSPB, it will be dismissed as a Defendant in this action.

Lastly, as collateral matter, Defendants ask this Court to disallow any additional claims of age discrimination related to the removal of Plaintiff's name from a list of eligible candidates for a job with Space Division. The Court agrees that any such claim has not been fairly pled as one seeking relief under the ADEA, but is rather pled as a "prohibited personnel practice" under 5 U.S.C. § 2302 that was properly consolidated in his appeal to the MSPB. This finding is further substantiated by the fact that Plaintiff's notice of suit to the EEOC may not fairly be read as containing any claim having to do with removal of his name on the basis of age. Therefore,

any such claim is subject to dismissal. An appropriate order will be entered herewith.

/s/ JUAN G. BURCIAGA
JUAN G. BURCIAGA
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 85-1485-JB

THOMAS W. HILL, PLAINTIFF

v.

DEPARTMENT OF AIR FORCE, MERIT SYSTEMS PROTECTION BOARD, PAUL S. BRITT, AND PAUL J. VALLERIE, DEFENDANTS

[Filed Sept. 3, 1987]

ORDER

THIS MATTER having come on for consideration on Defendants' motion to dismiss Plaintiff's sixth cause of action, and the Court having granted dismissal of the sixth cause of action;

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff's sixth cause of action, seeking judicial review of the MSPB decision of December 11, 1985, is hereby dismissed.

IT IS FURTHER ORDERED that Plaintiff's claims of age discrimination are hereby dismissed.

IT IS FURTHER ORDERED that Defendant MSPB is hereby dismissed as a Defendant in this action.

DATED this 3rd day of September, 1987.

/s/ JUAN G. BURCIAGA
JUAN G. BURCIAGA
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 85-1485-JB

THOMAS W. HILL, PLAINTIFF

v.

DEPARTMENT OF AIR FORCE, MERIT SYSTEMS PROTECTION BOARD, PAUL S. BRITT, AND PAUL J. VALLERIE, DEFENDANTS

[Filed Sept. 4, 1987]

MEMORANDUM OPINION

THIS MATTER comes before the Court on Defendant Air Force's motion to dismiss or for summary judgment on the second cause of action contained in Plaintiff's Second Amended Complaint. The Court, having reviewed the pleadings, the evidence of record and the relevant law, finds that the motion will be granted in part and denied in part.

In his second cause of action, Plaintiff seeks "judicial review" under the Privacy Act, 5 U.S.C. § 552a, of the Air Force's refusal to amend records pertaining to his employment with the Air Force. Second Amended Complaint, Second Cause of Action,

¶ 5. Plaintiff also requests "an award of damages because of agency failure to maintain his records with accuracy, relevance, timeliness, and completeness as was necessary to assure fairness in determinations of awards and other deserved benefits." *Id.* ¶ 6. Defendant Air Force moves to dismiss the second cause of action in its entirety, asserting that Plaintiff has failed to exhaust his administrative remedies.

By letter dated April 5, 1985, Plaintiff formally requested that the agency amend his AF Form 971 records in accordance with the provisions of the Privacy Act and Air Force Regulation 12-35. The letter was acknowledged within the ten-day time-frame required by the Act, 5 U.S.C. § 552a(d)(2), and requested that Plaintiff supply specifics regarding the records to be amended. Plaintiff sent his reply on May 3, 1985. By letter dated June 17, 1985, Pat H. Chrisman, local system manager for the records at issue, responded to Plaintiff's follow-up letter, indicating that Plaintiff's request was being forwarded to another department "for review and further guidance" because the "request appears to ask to amend information which is subjective in nature and therefore should not be processed as a Privacy Act request . . . ." Plaintiff subsequently received a letter dated August 13, 1985, from William H. Lewis, denying Plaintiff's request on the basis that the records in question are "in compliance" with the Privacy Act's requirements of "accuracy, relevance, timeliness and completeness as is reasonably necessary to assure fairness to the individual . . . ." Plaintiff was informed that should he decide to appeal this decision he must make a request for Secretarial review within sixty days from receipt of this denial letter. Plaintiff did not pursue an appeal. Instead,

Plaintiff sought relief in this court as described above.

The Privacy Act specifically authorizes civil relief. Title 5 U.S.C. § 552a(g)(1) states in relevant part:

> **(g)(1) Civil remedies.** —Whenever any agency
>
> (A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;
>
> . . . ;
>
> (C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or
>
> (D) fails to comply with any provisions of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,
>
> the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

Subsection (d)(3), referred to in paragraph A above, requires that "each agency that maintains a system of records shall—

> permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section . . . .

Defendant seeks to dismiss Plaintiff's cause of action under the Privacy Act on the basis that Plaintiff failed to comply with the administrative prerequisites contained in this subsection.

Plaintiff argues that his Complaint presents two distinct claims for relief under the Privacy Act; the first, seeking review of the agency's refusal to amend the designated records under 5 U.S.C. § 552a(g)(1)(A) and the second, seeking damages for Defendant's willful failure to maintain Plaintiff's records with the requisite "accuracy, relevance, timeliness and completeness as is necessary to assure fairness," as provided at § 552a(g)(1)(C).

While Plaintiff's Complaint is not a model of specificity, the Court agrees that Plaintiff's second cause of action states a claim requesting both equitable relief (amendment of records) and damages. Claims seeking amendment of records under subsection (g)(1) require that a claimant exhaust his administrative remedies, as outlined at subsection (d)(3), *supra*, before bringing a civil suit to compel amendment. *See Hill v. United States Air Force*, 795 F.2d 1067, 1069 (D.C. Cir. 1986); *Nagel v. United States Department of Health, Education & Welfare*, 725 F.2d 1438, 1441 (D.C. Cir. 1984). Plaintiff failed to seek complete administrative relief as required by subsection (d)(3). Plaintiff has failed to make even a preliminary showing why this requirement should be waived in this case. Therefore, his claim seeking amendment is not ripe for review by this Court and must be dismissed.

As to Plaintiff's suit for damages, under subsection (g)(1)(3), however, there is no requirement that a plaintiff exhaust his administrative remedies. *See Hill*, 795 F.2d at 1069-70; *Nagel*, 725 F.2d at 1441 n. 2. Defendant, however, alternatively seeks dismissal on the ground that Plaintiff has failed to satisfy the further condition of such a claim that he show he has suffered adverse consequences caused by the unfair record. Plaintiff does, however, allege to have suffered "in determinations of awards and other deserved benefits." While Plaintiff admittedly failed to provide specific details, Defendant could have sought to remedy this deficiency by seeking a motion for a more definite statement, pursuant to Fed. R. Civ. P. 12e. Furthermore, as Defendant did not raise this issue until its reply brief, Plaintiff did not have the burden of coming forward with relevant evidence on

this point. Likewise, the requirement tha[t] Plaintiff prove that the Defendant agency acted "in [a] manner which was intentional or willful," as re[quired by § 552a(g)(4), was not challenged by Defen[dant in a timely manner. Plaintiff did present some[evidence suggesting that he attempted to seek inform[al agency action without success, thereby raising a q[uestion of fact regarding the intent or willfulness of t[he agency conduct. As Defendant has not met its [burden on summary judgment to show it is entitled to[judgment as a matter of law on Plaintiff's claim for[damages, summary judgment on this claim will be d[enied. An appropriate order shall be entered herewith[.

/s/ JUAN G. BURCIAGA
JUAN G. BURCIAGA
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

Civil No. 85-1485-JB

THOMAS W. HILL, PLAINTIFF

v.

DEPARTMENT OF AIR FORCE, MERIT SYSTEMS PROTECTION BOARD, PAUL S. BRITT, AND PAUL J. VALLERIE, DEFENDANTS

[Filed Sept. 4, 1987]

ORDER

THIS MATTER having come on for consideration on Defendant Air Forces' motion to dismiss or for summary judgment on the second cause of action contained in Plaintiff's Second Amended Complaint;

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that Defendant's motion to dismiss Plaintiff's second cause of action is granted as to Plaintiff's request for amendment of records, but denied as to Plaintiff's claim for damages.

DATED this 3rd day of September, 1987.

/s/ JUAN G. BURCIAGA
JUAN G. BURCIAGA
United States District Judge